



## IV.2

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## Lost in translation: euro-compatibility, legal security, and the autonomous implementation of EU law in Switzerland

- (1) Introduction
- (2) The legislative policy of autonomous implementation
  - (a) The evolving rationales and forms of autonomous implementation
  - (b) Taking stock: on the extent and features of autonomous implementation
- (3) The autonomous implementation of EU law before the Swiss Supreme Court
  - (a) Background issues
  - (b) The answers of the Swiss Supreme Court: «Acquired Rights» and its progeny
- (4) Conclusion

### (1) Introduction

Switzerland is a member of neither the European Union («EU») nor the European Economic Area («EEA»). Swiss law is nonetheless strongly influenced by EU law. Switzerland is bound to apply the relevant *acquis* under several agreements concluded with the EU (so-called «**direct**» **Europeanization**). Even outside the scope of these agreements, it adopts legislation that mirrors rules and principles of EU law (so-called «**indirect**» **Europeanization**).<sup>1</sup>

Some use the label «**autonomous implementation**» as a synonym for indirect Europeanization as a whole. Swiss authorities «implement» (or rather reproduce) elements of EU law in national legislation, and they do so «autonomously», i.e. without international obligations.<sup>2</sup> Others, including the Swiss Supreme Court, reserve the label «autonomous implementation» for something more specific: the adoption of national legislation that mirrors EU law *because it aims to achieve euro-compatibility*.<sup>3</sup> This narrower definition distinguishes autonomous implementation from «mere inspiration» from EU regulatory models, such as in the Swiss Internal Market Act,<sup>4</sup> which is modelled on EU law but does not aim to achieve euro-compatibility.

Based on this *narrower definition*, I will present in sections 2 and 3 the legislative and judicial practice relating to the autonomous implementation of EU law in Switzerland, and formulate a few concluding remarks in section 4. Given that euro-compatibility is the central consideration behind

autonomous implementation, one would expect Swiss authorities to have devised legislative and hermeneutical techniques guaranteeing a high degree of fidelity to EU «mother law». That is not the case, at least for the time being. As we will see, *much is lost in the translation* from EU law to Swiss law.

### (2) The legislative policy of autonomous implementation

- (a) The evolving rationales and forms of autonomous implementation

The policy of autonomously implementing EU law in Switzerland officially began in 1988. In the *Report on European integration* published that year, the government suggested that Swiss legislation should, to all possible extent, be made euro-compatible in «the fields of law having a trans-boundary dimension», e.g. in the field of product regulations, «(and *only in those fields*)».<sup>5</sup> As a tool for informed decision-making, the government also introduced the practice of systematically screening the EU-compatibility of its own legislative proposals.<sup>6</sup>

The entry into force of the EEA Agreement, of which Switzerland was originally a signatory State, would have made it largely unnecessary to unilaterally implement the *acquis*.<sup>7</sup> However, Swiss voters rejected the EEA Agreement in December 1992. Thereafter, the policy of autonomous implementation took on a whole new dimension. The *Swisslex* package, launched in 1993 and completed by a second round of reforms in 1995, laid the foundations for a euro-compatible Swiss economic order. Legislation was passed in wide-ranging fields, *inter alia* technical standards, intellectual property, consumer protection, and labour law, in order to transpose Community law into Swiss law.<sup>8</sup>

At that point, the qualification that euro-compatibility would only be sought in «fields having a trans-boundary dimension» had largely been dropped. In the government's own words, the «euro-compatibility» of Swiss legislation had become a «fundamental principle»,<sup>9</sup> to the extent that by 1999 the autonomous implementation of EU law had become «systematic». Indeed, it was





noted that «[i]n practice, the Parliament and Government adopt[ed] measures that [were] not [euro-] compatible only in exceptional cases».<sup>10</sup>

It is worth noting that this statement essentially referred to economic law. At the time, this was practically the sole object of Community law. Moreover, the policy of **autonomous implementation** was (and still is) **mainly driven by an economic rationale** of facilitating the integration of the Swiss economy into the EU internal market by minimizing barriers, compliance costs and distortions of competition generated by regulatory divergences.<sup>11</sup>

In the 2000s, changes in the political and legal context led to speculation that the heyday of autonomous implementation had passed.<sup>12</sup> First, the political complexion of the government became less «euro-friendly». Accordingly, in the *Europe 2006* Report, expressions such as «systematic implementation of EU law» were discarded in favour of more guarded language: «[t]he autonomous implementation of EU law is *only* pursued when this is justified or required by Swiss economic interest (competitiveness) [...] In some areas, [...] Swiss legislation deviates from EU law and Switzerland *retains its autonomy* by applying, for instance, lower VAT rates».<sup>13</sup>

Secondly, from 2002 onwards many agreements with the EU started coming into force. This was seen to reduce the need for, or indeed the attractiveness of, autonomous implementation. The government itself pointed out that «the approximation to Community law should not be done unilaterally, but rather on the basis of agreements».<sup>14</sup> This preference is easily explained, since the autonomous implementation of EU law can minimize distortions of competition and reduce to some extent trade barriers, but not secure market access.<sup>15</sup>

In spite of all this, and even though it must be conceded that the heroic era of the *Swisslex* package was indeed behind, the autonomous implementation of EU law has continued unabated over the last decade. «Classic» autonomous implementation – i.e. harmonisation driven by a market rationale – was vigorously pursued in the 2003-2007 parliament.<sup>16</sup> New forms of autonomous implementation have also been introduced, such as the **unilateral application of the «Cassis de Dijon» principle** to products lawfully marketed in the EEA.<sup>17</sup>

Most interestingly perhaps, recent legislative practice has, in some cases, belied the central ideas un-

derpinning the government's statements quoted above – that the autonomous implementation of EU law has a strictly economic focus, and that it should be abandoned as more agreements are concluded. To begin with, agreements with the EU may not mandate harmonisation yet establish forms of cooperation that stimulate autonomous implementation, including in non-economic areas. The association of Switzerland to the so-called «Dublin system» is a case in point. The relevant agreement does not require Switzerland to apply EU asylum standards, but its «network logic» generates a functional pressure for Switzerland to autonomously implement them.<sup>18</sup> The logic of equality may also come into play to the same effect. The agreements with the EU may generate reverse discrimination and create pressure for Switzerland to unilaterally extend the scope of EU-derived «bilateral» rules to purely internal situations. This is the rationale behind provisions such as Article 4 § 3bis and 6 of the Internal Market Act,<sup>19</sup> or Article 42 of the Foreigners Act.<sup>20</sup>

These examples suggest that as the economic, societal and contractual relations between Switzerland and the EU become denser, the policy of autonomous implementation remains relevant and tends, moreover, to gain new forms, new rationales and new territories, even beyond the traditional (and still dominant) market-oriented logic.

#### (b) Taking stock: on the extent and features of autonomous implementation

As it emerges from the previous section, Swiss authorities have been **autonomously implementing EU law for more than twenty years**. This notwithstanding, they have so far renounced (or failed) to develop anything like a systematic approach.

As an entirely voluntary practice, autonomous implementation is subject to no overriding rules. Indeed, even regularities are hard to come by. The determination as to whether to seek compatibility with EU law is a political choice that is made on a case-by-case basis. How to make Swiss legislation compatible with EU law is also a matter of *ad hoc* choices – be it through the replication of EU provisions in Swiss laws and regulations (often with a «Swiss drafting polish»)<sup>21</sup> or through direct references to EU measures (usually in secondary rather than primary Swiss legislation).<sup>22</sup> Even determining whether a provision truly implements EU law may be a challenging task since the *travaux préparatoires* are all too often ambiguous on the issue of whether, why, and to what extent euro-compatibility is sought – including, perhaps, because «Eu-





rope» is such a sensitive matter in Switzerland, and *policy makers are not inclined to be too explicit*.

All these factors detract from the transparency of autonomous implementation, and make it difficult to gauge its true impact. The 2006 proposal to establish an official «marking», as well as an official «census» of national acts implementing EU law has been rejected on both practical and political grounds.<sup>23</sup> Scientific efforts to quantify the Europeanization of Swiss legislation are on-going, and their preliminary results are interesting as they «map» the most affected legal and policy fields. However, due to the methodological difficulties involved, the estimates of what proportion of Swiss law implements EU law are still rather tentative. One point is nonetheless rarely disputed: the *autonomous implementation of EU law is a large-scale phenomenon*, concerning a sizeable share of internal legislation.<sup>24</sup>

From the standpoint of legal homogeneity – not an irrelevant consideration, given that euro-compatibility is the overarching aim of autonomous implementation – *current practice suffers from two main shortcomings*.<sup>25</sup>

First of all, the implementation of EU law is nearly always *selective*. The Swiss legislator may choose to make a Federal Act wholly compatible with EU law, to make certain deviations from EU law or, conversely, to make just certain approximations in an otherwise «purely Swiss» Act.

Secondly, it is *static*. Swiss norm-givers generally refrain from legislating in a way that would allow Swiss law to evolve in parallel to EU mother law (such as through dynamic references).<sup>26</sup> Moreover, they do not systematically follow-up on the evolution of EU mother law. As a result, legislation that has been made euro-compatible may well – and often does – become «euro-incompatible» over time. For instance, the 1993 Product Liability Act, transposing Directive 85/374, was updated to Directive 1999/34 after a 10 years delay.<sup>27</sup> Article 333 of the Code of Obligations, reformulated in 1994 to transpose the old Employees' Acquired Rights Directive (Directive 77/187), has never subsequently been updated.<sup>28</sup> *Article 42 of the Foreigners Act*, which, as already noted, aims to avoid reverse discrimination in matters of family reunification, has spectacularly failed to achieve its purpose precisely on account of its *static character*. Its wording reproduces in detail the restrictive interpretation of free movement law prevalent at the time of its drafting. In the meantime, however, ECJ *case law has evolved in a*

*liberal sense*, and the Swiss Supreme Court has followed suit in interpreting the Free Movement of Persons Agreement. As a consequence, reverse discrimination has reappeared.<sup>29</sup>

To sum up, it is undisputed that a large (though still undetermined) proportion of Swiss legislation aims to implement EU law. However, this is done in a way that is often ambiguous, and almost invariably creates imperfect replicas.

### (3) The autonomous implementation of EU law before the Swiss Supreme Court

#### (a) Background issues

The legislative policy of autonomous implementation has placed before Swiss judges a number of *tricky methodological questions and choices*.

The most basic question is whether Swiss provisions implementing EU law are to be interpreted in conformity with EU case law and practice. A round «no» might appear justified on formal grounds. After all, the object of interpretation is domestic law, while EU law (including case law and practice) is foreign law.<sup>30</sup> Such a position is, however, barely tenable since it completely disregards the teleological element of interpretation, *in casu*, the euro-compatibility aims pursued by the legislator. With more nuance, one could posit that since Swiss judges traditionally make comparative references to foreign law,<sup>31</sup> they may, *a fortiori*, consider ECJ case law when interpreting provisions that purport to implement EU law. This approach – which the Swiss Supreme Court usually follows when dealing with provisions that are merely «inspired» by EU law<sup>32</sup> – defuses the hard methodological questions raised by autonomous implementation. It allows EU legal materials to be taken into account, but it does not commit the judge to EU (i.e. foreign) law. At the same time, it does not in any way guarantee that the goal of euro-compatibility will be attained in practice. It also gives judges unfettered discretion in the use of EU legal materials for the interpretation of a sizeable share of national legislation – hardly an ideal solution from the standpoint of legal certainty.

The third hermeneutical option is, of course, to accept that provisions whose purpose is to achieve euro-compatibility must also be interpreted in a euro-compatible way. However, once this is accepted – as a self-standing hermeneutical principle, as an instance of teleological interpretation, or on other grounds<sup>33</sup> – a number of other issues appear. On a purely practical level, *it may not*





*be easy to determine whether the provision at hand truly implements EU law.* As already noted, Swiss legislation may imperfectly reflect EU mother law, and even a careful examination of the *travaux préparatoires* may not yield conclusive results. Autonomous implementation, like beauty, is all too often in the eye of the beholder.

A more principled issue is how to balance the principle of euro-compatible interpretation with other principles of interpretation, in particular with literal interpretation. Is it allowed (or required) to disregard textual discrepancies between the Swiss «copy» and the EU «original»? Or is a minor «helvetism» enough to disable the duty of euro-compatible interpretation? In considering this question, one should again bear in mind the points made above: the will of the legislator may be elusive, and «helvetisms» may equally be due to mere drafting reasons or to a real will to differ.

Another principled, connected, issue is whether euro-compatible interpretation must be static or dynamic. As pointed out before, EU law evolves and Swiss provisions implementing it often do not. Should the judge disregard subsequent EU law and so defer to the will of the historic legislator, at the cost of renouncing to real euro-compatibility? Or rather act on the basis of an implicit mandate to realize euro-compatibility over time, absent contrary indications? And if so, to what extent? If subsequent EU law flies in the face of the wording of Swiss provisions, should it still orient their interpretation<sup>34</sup>?

(b) The answers of the Swiss Supreme Court: «*Acquired Rights*» and its progeny

The first published judgment of the Supreme Court dealing with the issues detailed above is the 2003 «*Acquired Rights*» case<sup>35</sup>. The case turned on the interpretation of Article 333 of the Code of Obligations, mentioned above.<sup>36</sup> The Supreme Court first held that «[d]omestic law that has been autonomously adapted to EU law must, in doubt, be interpreted in an «euro-compatible» manner [...]. [W]hen the Swiss legal order is adapted to a foreign legal order – here EU law – harmonization must not be sought only in the formulation of the norm, but also in its interpretation and application, insofar as this is permitted by the methods of interpretation that must be observed under national law». Secondly, it held that «the interpreter must [not only consider the legal situation known to the legislator, but] also keep an eye on the subsequent development of the law with which harmonization is sought».<sup>37</sup>

*The language of the Court is both bold and prudent.* It is bold, inasmuch as it creates ex *nihilo* a duty of euro-compatible interpretation, and espouses a dynamic conception of euro-compatibility. It is prudent, inasmuch as it makes clear that euro-compatible interpretation is a subsidiary means of interpretation that can be trumped by other considerations (e.g. text and context), and that there is no strict obligation to follow subsequent developments of EU law.

It is also worth noting that the judgment uses *very open-textured language*. Indeed, two of the judges that took part in its drafting went on to give sharply different readings of its implications in scientific articles.<sup>38</sup>

Since the «*Acquired Rights*» case, the Supreme Court has rendered a few published judgments on euro-compatible interpretation, which are occasionally «bold» but more frequently «prudent». In *Métropole television*, it relied on *subsequent EU legislation* to solve a contentious issue of Copyright law, absent a clear legislative intent to make Swiss law compatible with EU law.<sup>39</sup> In *Sat1*, it emphasised an (arguably minor) divergence between the Swiss provisions on sponsoring and subsequent EU law, and maintained that the former could not be interpreted in conformity with the latter<sup>40</sup> – even though the *travaux préparatoires* clearly hinted at euro-compatibility as a means to avoid distortions of competition to the detriment of Swiss firms.<sup>41</sup> The Court went on to note that «the corrections to Swiss Broadcasting law that might be needed [in order to avoid distortions of competition] cannot be brought by way of interpretation, since the legislature has very recently decided to maintain the pre-existing Swiss provisions».<sup>42</sup>

*The last chapter in the saga – the Swisscom judgment*, rendered in April 2011<sup>43</sup> – is noteworthy in several respects and deserves a closer look. Swisscom AG sought the annulment of a fine imposed by the Competition Commission («COMCO») for abuse of dominant position. The relevant provision of the Cartel Act<sup>44</sup> closely follows the wording of the TFEU and of ECJ case law, and COMCO applied it in conformity with EU practice in finding that Swisscom had «imposed unfair [...] prices» on its competitors. COMCO maintained that it was sufficient to establish a dominant position and the unfairness of prices, without the need to prove that Swisscom had actually threatened or coerced its counterparts.

The Court started by citing the «*Acquired Rights*» principle that provisions implementing EU law







ought to be interpreted in a euro-compatible manner.<sup>45</sup> This was not banal: a public law division of the Supreme Court had never before cited «*Acquired Rights*» as good precedent in published case law.

However, the Court went on to rule that the provisions at hand did not implement EU law, essentially on the strength of two arguments. On the one hand, the Court quoted a passage of the government's explanatory memorandum stating that the adoption of the Cartel Act had not taken place «on grounds of European policy»<sup>46</sup>. On the other hand, it observed that «Swiss [Competition] law does not correspond fully to EU [Competition] law».<sup>47</sup>

With due respect, neither argument adequately supports the Court's conclusion. The first argument is based on a rather selective reading of the *travaux préparatoires*. In other passages of the explanatory memorandum to the Cartel Act, the government had made it quite clear that (a) the Act takes into account EU law «save where, for very precise reasons, other solutions had to be chosen»<sup>48</sup>, and that (b) following EU law in Competition law is not merely a matter of inspiration, but serves the purpose of minimizing compliance costs for undertakings that are active both in Switzerland and the EU.<sup>49</sup> These passages suggest that even though the Act was not passed «on grounds of European policy», euro-compatibility was indeed an important consideration in its drafting. As to the second argument, the Supreme Court was of course right in pointing out that some provisions of the Cartel Act deviate from EU law such as the provisions on agreements between undertakings. But this does not detract from the fact that the provisions on the abuse of dominant positions are a carbon copy of EU law.

Not content with denying that Swiss law implemented EU law, the Court went on to give its own (euro-incompatible) interpretation of the Act after a perfunctory side-glance to ECJ case law. This was also quite surprising. One would have at least expected it to take notice of the manifest «European» inspiration of the provisions, and to perform a fuller comparative analysis of ECJ case law.<sup>50</sup>

To sum up, in *Swisscom* the Supreme Court took **one step forward and two steps back** in terms of euro-compatible interpretation. It has formally recognized the «*Acquired Rights*» case as a valid precedent in public law. At the same time, it has narrowed its scope dramatically by disregarding substantial – though admittedly not un-

equivocal – evidence that the provisions at hand indeed implemented EU law. Finally, Supreme Court failed to at least take the «comparative» hint provided by parallel wording.

It is yet to be seen whether this restrictive approach will set the standard in the future, or whether there will be further twists and turns in the Supreme Court's complicated relationship with euro-compatibility.

#### (4) Conclusion

The autonomous implementation of EU law is a **large-scale exercise in free (legal) translation**. «Free» to the extent that it is voluntary – at least from a legal, formal standpoint. «Free», also, to the extent the lawmaker and the judge perform it without a framework of supporting principles and rules being guided only by the overarching aim of euro-compatibility.

The first conclusion is inescapable. «**Free translation does not come anywhere near true implementation in terms of legal homogeneity**». While the autonomous implementation of EU law is no doubt an important transformative force for the Swiss legal order, the sense of the original mother law is lost to a considerable extent. Legislation itself is almost invariably an imperfect replica: selectivity and fossilization prevent «high fidelity». The end result of autonomous implementation is thus hybrid «EU-ized» Swiss legislation that stands apart from ordinary Swiss legislation both legally and politically, but is not quite the same as EU law.<sup>51</sup> The case law of the Supreme Court, for its part, is obviously insufficient (and actually does not attempt) to correct this «imperfection». It is true that the Supreme Court has established a principle of euro-compatible interpretation that is open to dynamic application. But clearly, euro-compatibility is a weak hermeneutical principle. The inactivity of the legislator, coupled to real, or supposed, textual impediments in the law, may be enough to dissuade Supreme Court Judges from pursuing judicial euro-compatibility. Moreover, as the *Swisscom* judgment indicates, it may even take less: slight ambiguities in the *travaux préparatoires* may rule out the euro-compatible interpretation of provisions that have been copied from EU law with a rather evident compatibility rationale in mind.

**Fidelity** to the original is not the only thing that **is lost in translation**. The second, more tentative conclusion that I would like to suggest is that legal security is also adversely impacted in the operation of the law.





We now know that special interpretive rules apply to the provisions that implement EU law – a sizeable part of Swiss legislation. But, the application of such special rules appears to be far from consistent. Many key choices are left to the intuition and inclinations of the deciding judge: how will he read the *travaux préparatoires* and provisions when, as is so often the case, they are less than straightforward on the issue of euro-compatibility? How far is he disposed to stretch the wording of the provisions at hand in order to make euro-compatibility work? Will he accept to give weight to subsequent legislation, or will he stick to an «originalist» reading of the legislator's intentions? In *Métropole*, weakly EU-ized provisions have been interpreted in conformity with subsequent EU Directives. In *Swisscom*, strongly EU-ized provisions have been interpreted in a purely «national» fashion. Indeed, in its present state, the case law of the Supreme Court suggests a provoking question: when we speak about the «euro-compatible interpretation» of Swiss law, do we refer to a principle for Swiss judges to apply, or rather to a «wild card» for Swiss judges to use at their discretion?

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<sup>11</sup> «Direct» and «indirect» Europeanization are terms mostly used in political sciences: see e.g. *Sciarini/Nicolet/Fischer*, How Europe hits home: evidence from the Swiss case, *Journal of European Public Policy*, 2004, p. 353-378.

<sup>2</sup> See e.g. Federal Council, *Rapport Europe 2006*, Feuille fédérale (FF) 2006 6461, at p. 6476 f. The extent to which this unilateral approximation to EU law is truly «autonomous», other than in a strictly legal sense, is a matter of debate: see e.g. *Freiburghaus*, Une adaptation hétéronome?, *La Vie économique*, 9-2004, p. 35; *Epiney*, How does European Union law influence Swiss law and policies?, in *Nahrath/Varone*, Rediscovering public law and public administration in comparative policy analysis: a tribute to Peter Knoepfel, Lausanne/Bern 2009, p. 179-195, at p. 182.

<sup>3</sup> See in particular Swiss Supreme Court, «*Acquired Rights*» case (ATF 129 III 335), § 6; *Cottier/Dzamko/Evtimov*, Die Eurokompatible Auslegung des schweizerischen Rechts, *Annuaire Suisse de droit européen* 2003, p. 357-392, at p. 360 and 389; *Oesch*, Die Europäisierung des schweizerischen Rechts, in: *Griller/Müller-Graff/Schwok* (eds), *Kleine Staaten innerhalb und außerhalb der EU – politische, ökonomische und juristische Fragen*, Vienna, forthcoming, section III.B.

<sup>4</sup> Classified Compilation of Federal law (Recueil systématique, hereafter RS), 943.02.

<sup>5</sup> Federal Council, *Rapport sur la position de la Suisse dans le processus d'intégration européenne*, FF 1988 III 233, at p. 365 (own translation, emphasis added). For a full discussion on the early practice of autonomous implementation, see

*Baudenbacher*, Zum Nachvollzug europäischen Rechts in der Schweiz, *Europarecht*, 1992, p. 309-320.

<sup>6</sup> Federal Council, cit. (note 5), at p. 330. This is now a formal obligation for all legislative proposals, regardless of their having a «trans-boundary dimension» (Article 141 of the 2002 Parliament Act, RS 171.10).

<sup>7</sup> See *Mader*, *Eurolex: ein Versuch, das schweizerische Recht dem Recht des Europäischen Wirtschaftsraumes anzupassen*, *Aktuelle juristische Praxis*, 1992, p. 1319-1329.

<sup>8</sup> Federal Council, *Message sur le programme consecutive au rejet de l'Accord EEE*, FF 1993 I 757; see also *Mallepell*, *Der Einfluss des Gemeinschaftsrechts auf die schweizerische Gesetzgebung 1993-1995*, *Swiss Papers on European Integration*, Bern, 1999.

<sup>9</sup> Federal Council, cit. (note 8), at p. 785 (own translation)

<sup>10</sup> Federal Council, *Suisse-Union européenne: Rapport sur l'intégration 1999*, FF 1999 3600, at p. 3609 and 3634 (own translation); see also *Oesch*, cit. (note 3), section III.A; *Spinner/Maritz*, EG-Kompatibilität des schweizerischen Wirtschaftsrechts: Vom autonomen zum systematischen Nachvollzug, in *Forstmoser et al.* (eds.), *Der Einfluss des europäischen Rechts auf die Schweiz*, *Festschrift für Prof. Roger Zäch*, Zurich, 1999, p. 127-138.

<sup>11</sup> Federal Council, cit. (note 10), at p. 3634. Political considerations were (and are) of course also relevant: see Federal Council, cit. (note 8), at p. 785.

<sup>12</sup> See e.g. *Schweizer*, Wie das europäische Recht die schweizerische Rechtsordnung fundamental beeinflusst und wie die Schweiz darauf keine systematische Antwort findet, in *Epiney/Rivière* (eds), *Interprétation et application des «traités d'intégration»*, Zurich, 2006, p. 23-56, at p. 34 f.

<sup>13</sup> Federal Council, cit. (note 2), at p. 6477 (own translation, emphasis added).

<sup>14</sup> *Ibidem*, at p. 6478 (own translation).

<sup>15</sup> *Ibidem*.

<sup>16</sup> See *Kohler*, *Influences du droit européen sur la législation suisse: analyse des années 2004 à 2007*, *Jusletter* 31 August 2009.

<sup>17</sup> See the amendments of 12 June 2009 (*Recueil officiel* 2009 3983) to the Federal Act on Technical Obstacles to Trade (RS 946.51). On the innovative character of this reform, relative to «classic» autonomous implementation, see *Oesch*, cit. (note 3), section III.C.

<sup>18</sup> See *Maiani*, Fitting EU asylum standards in the Dublin equation: recent case law, legislative reforms, and the position of Dublin «associates», *Revue suisse pour la pratique et le droit d'asile (ASYL)*, 2/10, p. 9-19. The point was conceded by the Federal Council (see *Message concernant la modification de la loi sur l'asile*, FF 2010 4035, at p. 4106).

<sup>19</sup> RS 943.02. See *Rivière*, *Un législateur détermine à ouvrir le marché intérieur Suisse*, *Annuaire Suisse de droit européen* 2004/2005, p. 209-231, at p. 222 f.

<sup>20</sup> RS 142.20. On the rules currently enshrined in art. 42, see the explanatory statement of the Federal Council, FF 2002 3469, at p. 3510. See also *Maiani*, La «saga Metock», ou des inconvénients du pragmatisme helvétique dans la gestion des rapports entre droit européen, droit bilatéral et droit interne, *Revue de droit suisse* 2011, I, p. 27-53.

<sup>21</sup> Compare for instance Article 1(1) of Directive 90/314 (OJ 1990 L 158/59) with Article 1 of the Federal Act on Package Travel (RS 944.3).

<sup>22</sup> Among innumerable examples, see e.g. Article 12 ff. of the Regulation on Product Safety, RS 930.111. References in primary legislation are usually less direct: see e.g. Article 7 of the Therapeutic Products Act (RS 812.21).

<sup>23</sup> See the Postulate presented by Roger Nordmann MP on 20 December 2006, n° 06.3839, as well as the negative reply of





the Federal Council, 14 February 2007. For a renewed attempt, see the Postulate presented by the same MP on 29 September 2011, n° 11.3916.

<sup>24</sup> See *Arbia*, The road not taken: Europeanization of laws in Austria and Switzerland 1996-2005, Geneva, 2006; *Kohler*, cit. (note 16); *Gava/Varone*, So close, yet so far? The EU footprint in Swiss legislative production, in *Costa/Brouard/König* (eds.), The Europeanization of domestic legislatures, 2012. It is in no way a criticism to stress that the results of these studies are still tentative. The mass of legislation to be screened is enormous. This leads, understandably, to narrowing down the scope of enquiry to primary legislation, and to relying on automated text searches (or manual, but cursory, searches). These steps are probably necessary on feasibility grounds, but they seriously undermine the reliability of the results. On the one hand, secondary legislation is very often the means for autonomously implementing EU law – primary legislation will merely delegate the government, and it will do the job (see above, note 21). Leaving it out is therefore highly problematic. On the other hand, as I have already noted, the autonomous implementation of EU law is not made according to fixed formulas (e.g. standard phrases in the *travaux* or explicit references to EU law in legislation). Therefore, «quick» searches are prone to producing «false positives» and (more conspicuously) «false negatives».

<sup>25</sup> On these points, see in particular *Schweizer*, cit. (note 12).

<sup>26</sup> Direct and dynamic references to EU legislation are considered problematic by the Federal administration: see Federal Office of Justice, *Guide de législation*, 3<sup>rd</sup> ed., Bern, 2007, § 8251.3.

<sup>27</sup> See Federal Council, *Message concernant la loi sur la sécurité des produits*, FF 2008 6771, at p. 6787 and 6812; amendments of 12 June 2009 (RO 2010 2573) to art. 3 of the Product Liability Act (RS 221.112.944).

<sup>28</sup> In the meantime, the Directive has been first amended by Directive 98/50 (OJ 1998 L 201/88), then superseded by Directive 2001/23 (OJ 2001 L 82/16).

<sup>29</sup> For further details, see *Maiani*, cit. (note 20).

<sup>30</sup> This reasoning was followed for instance by the Federal Administrative Court in the unpublished *Janssen-Cilag* judgment of 5 December 2007 (C-2092/2006), § 3.5.

<sup>31</sup> See *Gerber*, Der Einfluss des ausländischen Rechts in der Rechtsprechung des Bundesgerichts, in *Perméabilité des ordres juridiques* (Publications de l'ISDC n° 20), Zurich, 1992, p. 141-163.

<sup>32</sup> See in particular the *Association of Swiss Advertisers* judgment (ATF 128 I 295), § 4c.

<sup>33</sup> For different views on the dogmatic foundation of the principle of euro-compatible interpretation see e.g. *Wiegand/Brühlhart*, Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft, *Swiss Papers on European Integration*, Bern, 1999; *Cottier/Dzamko/Evtimov*, cit. (note 3); *Amstutz*, Interpretatio multiplex. Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335, in *Epiney/Riviere* (eds), cit. (note 12), p. 93-119; *Nyffeler*, Die Anwendung autonom nachvollzogener Normen des EU-Rechts, in *Festschrift 100 Jahre Aargauischer Anwaltsverband*, Zürich, 2005, p. 35-55; *Walter*, Das rechtsvergleichende Element – Zur Auslegung vereinheitlichten, harmonisierten und rezipierten Rechts, *Revue du droit suisse* 2007, I, p. 259-277. See also Federal Administrative Court, *AHP Manufacturing* (ATAF 2010/48), § 3 (teleological/historical interpretation).

<sup>34</sup> Compare, in particular, the views expressed by *Amstutz/Nyffeler*, cit. (note 33).

<sup>35</sup> ATF 129 III 335.

<sup>36</sup> *Ibidem*, § 6 (own translation).

<sup>37</sup> *In casu*, this allowed the Court to take into account subsequent EU law that had not been transposed in Swiss law (see above, note 28).

<sup>38</sup> See the articles by *Nyffeler* and *Walter*, cit. (note 33).

<sup>39</sup> ATF 136 III 335, § 6 and particularly 6.4.

<sup>40</sup> ATF 134 II 223, § 3.4.1.

<sup>41</sup> Federal Council, *Message relatif à la révision totale de la loi fédérale sur la radio et la télévision*, FF 2003 1425, at p. 1428, 1444, 1449 f. and 1465. Let it be noted that in enumerating the aspects on which it proposed deviations from EU law, the government did not mention the provisions on sponsoring: see *ibidem*, p. 1473 ff.

<sup>42</sup> ATF 134 II 223, § 4.2 (own translation).

<sup>43</sup> ATF 137 II 119.

<sup>44</sup> RS 251.

<sup>45</sup> *Ibidem*, § 4.3.1.

<sup>46</sup> *Ibidem*, § 4.3.2. (own translation)

<sup>47</sup> *Ibidem*, § 4.3.2. (own translation)

<sup>48</sup> Federal Council, *Message concernant la loi fédérale sur les cartels et autres restrictions de la concurrence*, FF 1994 472, at p. 476 and 532 (own translation, emphasis added).

<sup>49</sup> *Ibidem*, at p. 529 ff and especially at p. 531.

<sup>50</sup> See above, note 32.

<sup>51</sup> See *Maiani*, Legal Europeanization as legal transformation: some insights from Swiss «outer Europe», *EUI Working Papers*, MWP 2008/32, Florence.

